United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPELLANT'S BRIEF AND APPENDIX

408

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,565

LEONARD J. FURBEE,

Appellant,

v.

VANTAGE PRESS, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

SAMUEL INTRATER
ALBERT BRICK

1010 Vermont Avenue, N.W.
Washington, D.C. 20005

Attorneys for Appellant

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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TABLE OF CASES

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* Appellant relies on all cases cited, equally.

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APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF ISSUES

Appellant asserts that the only issue involved on appeal is whether the Trial Court properly granted Defendant's Motion to Dismiss in that Appellant contends that individual parties have no right contractually either to confer jurisdiction upon a court or to deprive a court of its jurisdiction.

This case has never previously been before this Court.

REFERENCE TO RULINGS

The Court below granted Appellee's Motion to Dismiss. The Court's Order appears in the Appendix (p. 11).

STATEMENT OF THE CASE

Appellant (hereinafter referred to as "the author") entered into a contract with Appellee (hereinafter referred to as "the publisher") for the publication, sale, promotion, etc., of the author's book, "Twenty-Four Years With Lincoln."

Thereafter the author filed suit below, couching his Complaint in two counts: (a) Breach of Contract and (b) Fraud. The first count alleged a breach by the publisher of specific provisions of the contract, regarding the sales promotion, distribution, advertising and publicity with regard to the author's book.

The second count alleged fraudulent misrepresentations by the publisher as to its outlets, contacts with bookstores, newspapers, etc., as well as misrepresentations concerning the publisher's catalog and its distribution.

The publisher filed a Motion to Dismiss, based on Paragraph 20 of the contract, which provided that "the legal tribunals of the State of New York shall be the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract."

The Motion to Dismiss was granted.

ARGUMENT

It is the position of the author that individual parties cannot, by their own agreement, deprive a court of its jurisdiction. This would have been the effect of Paragraph 20 of the Contract and indeed, the Court below so held. By like token, parties cannot confer jurisdiction upon another court where such jurisdiction does not lie as a matter of law.

The author refers this Honorable Court to the case of *Woodmen of the World v. F.C.C.*, 99 F.2d 122, 69 App. D.C. 87. That case involved the issue of whether this Court had jurisdiction over a case, when a petition for rehearing was still pending in the lower tribunal. In opposition to a dismissal by this Court, it was urged that all of the parties had treated the petition for rehearing as abandoned, and did not consider it to be still pending below. That, further, all the parties had acted as though the appeal were validly before this Court.

This Court, however, dismissed the appeal, holding: "Jurisdiction cannot be given to a court by consent, acquiescence, or inadvertence. It can acquire jurisdiction only by auhtority of law" (99 F.2d at page 123).

United States v. Ickes, 84 F.2d 257, 66 App. D.C. 3, involved the question of whether the District Court – known then as the Supreme Court of the District of Columbia – had jurisdiction over a claim originally filed with the Secretary of the Interior. This Court listed the various elements which were lacking, and essential to jurisdiction. In answer to the contention that the parties had submitted themselves to the Court's jurisdiction by the entry of a Consent Order, this Court held that since the lower court did not have jurisdiction, the Consent Order was a nullity, stating, 84 F.2d at page 260: "Nor can this lack of jurisdiction be waived . . . nor will consent or silence supply it."

United States v. I.C.C., 8 F.2d 901, 56 App. D.C. 40, involved the jurisdiction of the Court over matters under the Transportation Act of February 28, 1920. In answer to appellant's argument that "the jurisdiction of the court to issue the Writ of Mandamus as prayed for, was admitted by the pleadings," this Court held: "Jurisdiction cannot be conferred upon the court either by admissions, stipulations, or otherwise." (8 F.2d at page 902.)

See also, *Guardian Investment v. Rubinstein*, 192 A.2d 296.

It thus becomes apparent that jurisdiction is a matter which is inherent to a court. Individuals, by their own acts, cannot confer jurisdiction upon a court which lacks it, nor deprive a court of jurisdiction which it has.

Therefore, Paragraph 20 of the Contract, which sought to strip the lower court of its jurisdiction and confer it upon the New York Courts was a nullity and should not have been honored by the Court below.

CONCLUSION

Appellant prays that this Court reverse the ruling of the District Court in granting the Motion to Dismiss, and remand for a trial on the merits.

Respectfully submitted,

SAMUEL INTRATER
ALBERT BRICK

1010 Vermont Avenue, N.W.
Washington, D.C. 20005

Attorneys for Appellant

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD J. FURBEE
3306 Patrick Henry Drive
Falls Church, Virginia 22044
Plaintiff,

v.

VANTAGE PRESS, INC.
A Body Corporate
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
Defendant.

Civil Action No. 334-70

COMPLAINT FOR BREACH OF CONTRACT AND FRAUD

1. Plaintiff is an adult citizen of the United States and a non-resident of the District of Columbia. Defendant is a body corporate having offices and doing business in the District of Columbia. The amount in controversy exceeds the sum of $10,000.00, besides interest and costs.

FIRST COUNT

1. Plaintiff alleges that prior to May 20, 1967, Plaintiff entered into a series of negotiations with agents, servants and employees of the Defendant. That said negotiations were conducted both orally and in written correspondence. That as a result of the same, Plaintiff and Defendant entered into a written contract whereunder the Defendant was to publish Plaintiff's manuscript

entitled "TWENTY-FOUR YEARS WITH LINCOLN". That said contract was entered into by the parties on May 20, 1967, and pursuant thereto the Plaintiff advanced the sum of $2,854.50 toward the printing of said manuscript.

2. Plaintiff alleges that the Defendant breached the terms and conditions of the contract, in that said Defendant, contrary to its agreement, failed and refused to aid in the sales promotion, distribution, advertising and publicity with regard to Plaintiff's manuscript. That furthermore, the said Defendant failed and refused to carry out, in accordance with its contract and representations, a planned and coordinated sales distribution campaign. That as a result of said breach of contract by the Defendant, Plaintiff has sustained damage in the loss of the sum advanced by him in the amount of $2,854.50. That Plaintiff has further sustained damage in the loss of contemplated sales of his book.

WHEREFORE Plaintiff demands judgment of the Defendant in the sum of $100,000.00.

SECOND COUNT

1. Plaintiff refers to the facts as set forth in the First Count and incorporates the same herein by reference.

2. Plaintiff alleges that the Defendant, through its agents, servants and employees, made representations to the Plaintiff to induce the Plaintiff to enter into the contract herein. That among said representations, Defendant represented that said Defendant had numerous valuable contacts in leading book stores, newspapers and magazines throughout the United States. That as a result of such contacts, said Defendant was in a position to, and therefore would, stock for sale Plaintiff's book throughout leading book stores in the United States and also mentioned in well-known book reviews in leading magazines and newspapers throughout the United States. That furthermore, Plaintiff's

manuscript would be listed in Defendant's catalog and that said catalog was distributed in leading book stores throughout the United States which would facilitate the sales promotion, distribution and advertising of Plaintiff's book. That said representations of the Defendant were false and that the same were made knowingly and intentionally in order to induce the Plaintiff to enter into a contract with the Defendant. That the Plaintiff relied upon the said misrepresentations and as a result of such reliance, has been damaged in the loss of his investment with regard to printing costs, as well as the loss of earnings and income from the sale of his book which Plaintiff reasonably would have obtained except for the above-described misrepresentations. That in fact, Defendant did not have the said valuable contacts which it had represented and Defendant further did not at any time intend to proceed with the sales promotion campaign which it had represented to the Plaintiff.

WHEREFORE Plaintiff demands judgment against the Defendant in the sum of $100,000.00 as compensatory damages and an additional sum of $100,000.00 for punitive damages, besides costs.

/s/ LEONARD J. FURBEE

BRICK AND INTRATER
Attorneys for Plaintiff
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
347-6953

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) SS:
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Leonard J. Furbee, being first duly sworn on oath, according to law, deposes and says: That he is the Plaintiff in the above and foregoing Complaint; that he has read said Complaint by him subscribed and knows the contents

thereof; that the matters and things therein contained are true to his best knowledge, information and belief.

/s/ LEONARD J. FURBEE

Subscribed and sworn to before me this _____ day of January, 1970.

_____

Notary Public

Plaintiff Demands Trial by Jury.

MOTION TO DISMISS

Comes now the Defendant, Vantage Press, Inc., by its attorney, pursuant to the provisions of Rule 12(b) of the Federal Rules of Civil Procedure and moves the Court to dismiss the complaint herein and to quash the service of summons effected upon the Defendant, and as grounds for this motion states:

1. That the Court is without jurisdiction over the action.

2. That the Court is without venue jurisdiction over the Defendant.

3. That paragraph 20 of the contract under which the suit herein is brought and upon which the complaint is buttressed, restricts the venue to "the legal tribunals of the State of New York", and makes such tribunals "the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract."

4. That a photocopy of said contract is attached hereto and made a part hereof by reference.

5. And for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

HARRY S. WEIDBERG
Attorney for Defendant
1401 K Street, N. W.
Washington, D. C. 20005

[Certificate of Service]

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

1. Prefatory Statement:

Plaintiff and Defendant entered into their contract on May 20, 1977, whereby they mutually agreed to the 32 paragraphs embodied in the said contract which is attached to and made a part of the motion to dismiss, by reference.

Paragraph 20 of the foregoing contract provides as follows:

> "Regardless of the place of physical execution of this agreement, or its delivery, it shall be treated as though executed within the State of New York and shall be governed and interpreted according to the laws of that state; and the legal tribunals of the state of New York shall be the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract."

Plaintiff's complaint is drawn in two counts. The first charges a breach of contract, while the second count charges that misrepresentations induced the Plaintiff to enter into

the contract with the Defendant. The averments in count two of the complaint are foreclosed by the contract itself. Moreover count two contrives to resort to parol evidence to defeat the plain and unambiguous language of the written contract signed by Plaintiff. Paragraph 14 of the attached contract contains a clear detail of the things charged as misrepresentations in count two of the complaint. Both counts, one and two, charge matters arising out of or pertaining to the contract.

The Plaintiff having consented by contract to submit any dispute arising out of the contract to the courts of the state of New York for determination and having had the benefit of the publication pursuant to such contract, cannot now repudiate the consent provision embodied in said contract by maintaining this action in the Courts of the District of Columbia.

ARGUMENT

2. THE TRIBUNALS IN THE STATE OF NEW YORK ARE THE ONLY FORUM IN WHICH PLAINTIFF'S SUIT CAN BE BROUGHT

Paragraph 20 of the contract, quoted herein above, restricts litigation between the parties hereto to the tribunals of New York as sole forum. Notwithstanding the foregoing restriction, the Plaintiff has brought his action in the District of Columbia in defiance of the provisions of said section 20 of the contract.

The question, therefore, presented for the determination of this Court, is whether the parties to a contract may restrict any action arising out of the contract to a particular or pre-determined forum. This question was fully discussed and decided by the Supreme Court of the United States, in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165. There the Court, speaking through Mr. Justice Frankfurter, said, among other things, that:

"The jurisdiction of the Federal Courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition." The opinion of the Court further stated, in reference, to the opinion of Chief Justice Waite in *Ex Parte Schollenberger* (96 U. S. 369), that the parties were not geographically found in Pennsylvania, "and Chief Justice Waite so recognized. They were 'found' in the Eastern District of Pennsylvania only in a metaphorical sense because they had consented to be sued there by complying with provisions for designating an agent to accept service. Not less than three times does the opinion point out that the corporation gave 'consent' to be sued, and because of this consent the Chief Justice added that the corporation was found there. But the crux of the decision is its reliance upon two earlier cases, *B & O Railroad Co. v. Harris,* 12 Wall. 65 – and *LaFayette Ins. Co. v. French,* 18 How. 404, recognizing that 'consent' may give 'venue'. The Phoenix and Clinton Insurance Company consented not to be 'found' but to be sued. Since the corporation had consented to be sued in the courts of the state, this court held that the consent extended to the Federal courts of the several states." In concluding his opinion, Mr. Justice Frankfurter said: "In finding an actual consent by Bethlehem to be sued in the Courts of New York, Federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case."

The question was again presented and decided by the Supreme Court in the case of *National Rental v. Szukhent,* 375 U. S. 311, 315-316. There Mr. Justice Stewart stated, among other things, that: "The question presented

here, on the other hand, is whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rules of Civil Procedure 4(d)(1), where the agent is not personally known to the party, and where the agent has not expressly undertaken to transmit notice to the party. The purpose underlying the contract provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the state of New York. The contract specifically provided that "this agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the state of New York.' And it is settled, as the courts below recognized, *that parties to a contract may agree in advance to submit to the jurisdiction of given court, to permit notice to be served by the opposing party, or even to waive notice altogether.*" (emphasis supplied)

Mr. Justice Stewart, next, cited with approval the following cases: *Kenny Construction Co. v. Allen,* 101 U.S. App. D.C. 334, 248 F.2d 656 (1957), *Bowles v. Schmitt & Co.,* 2 cir., 170 F.2d 617 (1948) and *Gilvert v. Burnstine,* 255 N.Y. 348, 174 N.E. 706 (1931).

In the case of *Levine Associates, Inc. v. Hudson,* (U.S.D.C., S.D.N.Y., 1967), 43 F.R.D. 392, the contract between the parties provided that: "All actions shall be litigated within the state of New York and the aforesaid parties consent to the jurisdiction of any court within the state of New York and waive personal service of all process upon them and hereby consent that such service may be made by registered or certified mail directed to them at the address indicated herein."

In upholding the above agreement as valid, the court pointed out that the law is well settled that parties may contract in advance as to the forum to which the contractual disputes shall be tried. That a party can submit himself to the personam jurisdiction of a court in advance of litigation by so stipulating in a contract.

Holding to the same effect is the case of *National Equipment Rental, Ltd. v. De-Wood,* 267 N. Y. S. 2d 820 (1966).

It was held in the case of *Emerson Radio, etc. v. Eskind,* 228 N. Y. S. 2d 841, 843, by Justice Stevens, that: "Consent jurisdiction is not violative of due process. More particularly is this true where the method provided by the terms of the consent is reasonably calculated to give the party notice so that he may be afforded the opportunity of being heard. The Defendant having recognized the validity of the agreement with a domestic corporation by operating under or within its terms, shall not now be permitted to repudiate its consent provision because the contingency of litigation foreseen and provided, has become a reality."

CONCLUSION

In the light of the rulings of the Supreme Court of the United States coupled with the other decisions of the courts discussed herein above, the Defendant represents to the court that the parties herein have consented by contract to adjust their disputes in the legal tribunals in the state of New York, and in consequence thereof no other courts have jurisdiction of the cause of action herein.

WHEREFORE, the Defendant urges the court to quash the service of summons upon it and to dismiss the complaint herein.

Respectfully submitted,

/s/ HARRY S. WEIDBERG,
Attorney for Defendant

[Filed March 24, 1970]

OPPOSITION TO MOTION TO DISMISS

Comes now the Plaintiff, by and through his attorneys, and opposes the Motion To Dismiss filed herein, and as grounds therefor states as follows:

1. Said Motion fails to state sufficient grounds upon which a dismissal of this action could be granted.

2. Said Motion relies upon a provision of the contract between the parties which would attempt to limit the jurisdiction of this Court. Such a provision is void.

3. Such other grounds as are set forth at time of hearing.

BRICK AND INTRATER
Attorneys for Plaintiffs

[Certificate of Service, dated March 24, 1970]

MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant, in support of its Motion To Dismiss, refers to a provision of the contract between the parties which asserts that the tribunals of the State of New York shall be the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract. Plaintiff submits, however, that any such provision would be void in that jurisdiction of a court cannot be either granted or denied by consent of the individual parties. In this regard, Plaintiff refers this Honorable Court to *United States v. Ickes,* 74 F.2d 257, 66 App. D.C. 3; *United States v. Interstate Commerce Commission,* 8 F.2d 901, 56 App. D.C. 40; *Guardian Investment Corp. v. Rubenstein,* 192 A.2d 296; *Woodmen of the World, Etc. v. Federal Communications Commission,* 99 F.2d 122, 69 App. D.C. 87.

Defendant relies principally upon the Supreme Court case of *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165. This case is not at all in point. The *Neirbo* case merely held that state statutes which require foreign corporations doing business within the state to appoint a local agent upon whom service of process may be had, are perfectly proper statutes and that when service of process is obtained under such a statute, the jurisdiction of the Court of that state attaches against the foreign corporation. This is a far cry from holding that individual parties, by contract, can deprive a Court of jurisdiction which it normally has over the parties. In the instant case, the Defendant is doing business in the District of Columbia and was duly served with process and is, therefore, within the jurisdiction of this Court. In addition, the facts in this case allege a breach of a contract, as well as a fraud perpetrated in the District of Columbia, and the subject matter is clearly within the jurisdiction of this Court.

In addition to the foregoing, even if it were to be held that any disputes arising out of the contract should be referred to the courts of New York, it should still be noted that a major portion of the complaint deals with matters dehors the contract, namely: the fraud perpetrated by the Defendants upon the Plaintiff in the District of Columbia. Clearly, this is within the jurisdiction of this Court and, under the circumstances, clearly Defendant's Motion to Dismiss should be denied.

BRICK AND INTRATER
Attorneys for Plaintiff

[Filed June 17, 1970]

ORDER

This matter having come on to be heard upon Plaintiff's motion to dimiss and argument having been heard, it is by the Court this 17th day of June, 1970,

ORDERED that the complaint be and it is hereby dismissed.

/s/ JOHN LEWIS SMITH, JR.
Judge

NOTICE OF APPEAL

Notice is hereby given this 15th day of July, 1970, that the Plaintiff, Leonard J. Furbee, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of June, 1970 against said Plaintiff, Leonard J. Furbee.

BRICK AND INTRATER

/s/ SAMUEL INTRATER
Attorney for Plaintiff

[Certificate of Service]

Soft Cover or Other Reprint Edition	First Serial (Pre-Publication)
Dramatic	Second Serial
Radio and Television	Syndication
Book Club	Mechanical Reproduction
Digest, Abridgement, Condensation or Extracts	Commercial Use of Title
Anthology or Quotation	Merchandising Tie-Ins
Motion Picture	Foreign Language Publication

British Publication

Should any revenue accrue from any other rights in the said Work, not specifically mentioned above, such revenue shall also be divided in the proportion of 80% to the Author and 20% to the Publishers. This provision shall not be deemed a representation, warranty or guaranty of revenue from any or all such rights.

Copies Must Be Available to Fill Bona Fide Orders

7. The Publishers agree during the term of this contract to print and bind from time to time sufficient copies of said Work to fill all bona fide orders, and agree, furthermore, to have a minimum of four hundred bound copies available at least thirty days before official publication date, for purposes of sales, review, and pre-publication publicity and promotion.

Review Copies

8. The Publishers agree to distribute, for purposes of publicity, sales, subsidiary rights, comment and review, from seventy-five to one hundred copies of the said Work to newspapers, magazines, dealers and other outlets throughout the United States of America and/or in foreign countries, as the Publishers may deem advisable. Distribution of these copies shall be to publications of the Publishers' choice, unless otherwise provided for hereinafter, and at no extra cost to the Author.

Copies Not Subject to Payment

9. The Author agrees that all copies of the said Work that may be used for review, merchandising, and/or publicity purposes, and all that the Publishers may deliver to the Author without receiving payment in money, and all that the Publishers may deliver to the Author at a discount from the established retail price, shall not be subject to any payment to the Author.

Author's Copies and Author's Purchases

10. The Publishers agree to deliver to the Author fifty copies of the said Work, without extra charge, F.O.B., the Publishers' New York office, on completion thereof, after all sums of money that may be due the Publishers, as hereinafter provided for, have been paid in full. Should the Author purchase additional copies of the Work directly from the Publishers, same will be supplied at a discount of 45% from the established retail price, F.O.B., the Publishers' New York office. The Author may dispose of these copies in any manner and, if re-sold, may retain all monies derived therefrom.

Statements of Account

11. The Publishers agree to render and forward to the Author, during the months of April and October next succeeding the official date of publication of the said Work, and continuing thereafter twice annually during such designated months while this agreement remains in full force and effect, statements of account setting forth the number of copies sold and paid for as of the previous six-month periods ending December 31st and June 30th, respectively, and also of any other income received from other sources to be accounted for hereunder, together with remittances in full payment of all sums shown to be due to the Author thereon. Should the sale of the Work fall below fifty copies in any six-month period, the Publishers may, at their discretion, defer issuing statements or making payments thereon, until total sales and receipts have reached a minimum of fifty copies.

Editing of Manuscript

12. (a) If, in the Publishers' opinion and judgment, the manuscript of the said Work requires copy-editing, or other editorial treatment, the Publishers agree to provide same without extra cost or expense to the Author. It is specifically understood and agreed, however, that the Publishers shall make no major revisions, changes, alterations or deletions therein without first consulting the Author and receiving written permission to do so.

(b) The Publishers reserve the right to delete, modify and/or make any such editorial changes and/or revisions in the said Work as they deem advisable or necessary in the event that the context, or implications, of any part or parts of the said Work would, in their judgment, incite prejudice or defame any group or any members thereof, either individually or collectively, because of race, religion or nationality, or in the event that any part or parts of the said Work may be considered by the Publishers to be obscene, offensive, indecent, libelous or against the public welfare.

Author's Alterations

13. If the Author shall make any changes and/or alterations in the proofs of the said Work, which deviate from the manuscript of same as originally submitted to the Publishers and edited by the Publishers (other than corrections of printers' errors), or if the Author shall add new material thereto at any time following the signing of this agreement, the Publishers agree to make such changes and/or alterations, and/or to add such new material, only on condition that the said changes and/or alterations and the inclusion of any new material shall be approved by the Publishers, and also on condition that the Author shall pay to the Publishers, on request, all the additional costs and expenses involved.

Sales Promotion, Distribution, Advertising

14. Sales promotion, distribution, advertising and publicity shall be at the Publishers' election and discretion as to the extent, scope and character thereof and in all matters pertaining thereto, and same shall be at no extra cost to the Author, unless otherwise provided for. It is specifically understood and agreed, however, that the promotion, publicity and advertising recommendations, as set forth by the Publishers in the *Author's Manuscript Report* submitted to the

Agreement made and entered into by and between

LEONARD J. FURREE
3306 Patrick Henry Drive
Falls Church, Va. 22044

party of the first part, hereinafter called the Author, and VANTAGE PRESS, INC., a corporation duly organized and operating under the laws of the State of New York, whose principal offices are located at 120 West 31st Street, New York, N. Y. 10001, party of the second part, hereinafter called the Publishers:

WHEREAS, the Author represents and warrants to be at least twenty-one years of age and is the sole composer and/or proprietor of a literary work at present known as

TWENTY-FOUR YEARS WITH LINCOLN

hereinafter called the Work, which Work the Publishers agree to produce in book form on the terms and conditions specified hereinafter,

IT IS HEREBY MUTUALLY AGREED between the Author and the Publishers as follows:

Grant of Rights

1. The Author hereby grants and assigns to the Publishers, during the full term of United States copyright, and of all renewals thereof, if any, the exclusive right to print, publish, sell and export, or cause to be printed, published, sold and exported, the said Work in the English language (and in any foreign language, or languages, as the Publishers may deem desirable) in the United States of America, its dependencies and territories, and in the Dominion of Canada, and also the exclusive right to arrange for the publication of the said Work in the British Empire and Commonwealth and in all other foreign countries.

Physical Specifications

2. The Publishers agree to produce the said Work in the English language, in hard-covered book form, and in such format, type and style of paper, jacket and binding as they believe will make the volume attractive-looking. It is specifically understood and agreed, furthermore, that the said Work will contain all manuscript material as originally submitted by the Author (unless otherwise designated hereinafter or provided for), and that the approximate size of the volume, when completed, will be 5½ inches by 8½ inches.

Author's Copyright Protection

3. The Publishers agree to take all steps necessary to obtain copyright in the said Work in the name of the Author, and thereby secure their own rights and those of the Author under the United States Copyright Acts. Both parties, furthermore, agree to execute, at any and all times, when necessary, all such papers and/or other documents as may be required in order to protect, assign, renew or otherwise effectuate the rights herein. Copyright protection may also be taken out by the Publishers, in the name of the Author, in foreign countries, as the Publishers may consider to be necessary or desirable. The statutory United States copyright fees shall be paid by the Publishers.

Retail Price and Payments to Author

4. The retail price shall be $..2..95.....per copy. The Publishers agree to pay to the Author $...1..18.....per copy (*40% of the retail price*) on every copy of the said Work up to and including the first....4000.....copies that may be sold and for which the Publishers shall receive payment in money of the United States of America, or the equivalent thereof. On foreign sales, and on sales made at a discount of more than 45% of the retail price, the Author shall receive 20% of the retail price.

Sample and Promotion Copies

5. No payment shall be made to the Author on any copies of the said Work that the Publishers may distribute for advertising and/or sales and merchandising purposes, or as samples to prospective customers (including dealers and wholesalers), or on copies that may have been distributed in any fashion but which were damaged or destroyed by fire and/or water or otherwise injured, or on copies that may be lost in transit or in any other manner, unless such damage, loss or destruction is due to negligence on the part of the Publishers.

Author's Compensation for Motion Pictures, Reprints, and Other Subsidiary Rights

6. No payment shall be made to the Author for permission gratuitously given to others to publish extracts from the said Work with a view toward benefiting the sale thereof, or to create publicity or promotion thereon. But all net compensation received by the Publishers for the sale of the following subsidiary rights shall be divided in the proportion of 80% to the Author and 20% to the Publishers:

Author prior to, or simultaneous with, the signing of this agreement, will be performed by the Publishers within a reasonable period of time following completion of the said Work, provided that the Author has fully and completely performed each and every term, covenant and condition to be performed by him under the terms of this agreement. It is agreed, furthermore, that the recommendations in the said *Author's Manuscript Report* represent the minimum promotion program allocated to the said Work and will constitute the Publishers' full and satisfactory compliance as provided for in this agreement.

Design and Production

15. The Author agrees that all matters dealing with the design and production of the said Work shall be at the discretion and election of the Publishers, unless otherwise provided for.

Subsequent Printings at Publishers' Expense

16. While this agreement refers to the number of copies designated in Article 4, nothing contained herein shall be deemed to limit the right of the Publishers, in their discretion, to produce additional printings and/or editions at any time during the life of this agreement, if sales warrant. On sales in excess of those mentioned in said Article, the Author shall receive a royalty of 25% of the retail price of all copies that may be paid for. On foreign sales, and on sales made at a discount of more than 45% of the retail price, the Author shall receive a royalty of 12½%. It is specifically understood and agreed, furthermore, that these additional printings and/or editions, if any, shall be produced entirely at the Publishers' cost and expense.

Author's Proofs

17. The Author shall have the right to examine, approve and correct, if necessary, all proof sheets of the said Work that may be submitted by the Publishers during the period the said Work is in production, but the Author shall be required to return same to the Publishers within fifteen (15) days after receipt. The Publishers shall not be held liable or responsible for any delay in the completion and release of the said Work should the Author fail or neglect to return proof sheets, and/or other pertinent material relating to the said Work, within such fifteen (15) day period.

Author's Original Manuscript

18. Should the Author desire that the original manuscript of the said Work, and/or any other material belonging to him, be returned following publication, application for its return shall be made to the Publishers, in writing, within thirty (30) days after the signing of this agreement; failure on the part of the Author to make such application will automatically remove from the Publishers any and all responsibility or liability thereon.

Author and/or Publishers May Negotiate Rights

19. The Author and the Publishers hereby agree that each shall have the right, for the period of copyright and renewal copyright of the said Work, to negotiate for the sale, lease, license or other disposition of the said Work in the motion picture, dramatic, radio, television and/or all other fields. It is also agreed that the Publishers may engage an agent, or agents, to negotiate, or assist them in negotiating, for such sale, lease, license or other disposition, and the fee to the agent or agents (not more than 10%) is to be deducted from the gross revenue received by the Publishers before allocation of the proper percentage to the Author. All gross monies and compensation received in payment for such sale, lease, license or other disposition shall be collected and disbursed by the Publishers, and all contracts for such sale, lease, license or other disposition shall provide that such monies and compensation are to be paid to the Publishers; and the Publishers are authorized to receive, collect and disburse same and to endorse and deposit all checks and/or drafts for such payments.

New York Law

20. Regardless of the place of physical execution of this agreement, or of its delivery, it shall be treated as though executed within the State of New York and shall be governed and interpreted according to the laws of that State; and the legal tribunals of the State of New York shall be the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract.

Infringement of Copyright

21. In the event of the infringement, by others, of the copyright, or other rights, in the said Work, the Publishers may, in their discretion, sue, or employ other remedies as they may deem expedient, and shall pay to the Author 50% of the net proceeds of any recovery.

No Termination of Contract for at Least Two Years

22. The Publishers shall not have the right to terminate this agreement before two (2) years from the date of delivery of bound copies of the said Work to the Author. At any time thereafter, however, should the Publishers determine that there is not sufficient demand for said Work to enable them to continue to handle same profitably, they may then terminate this agreement by giving the Author notice thereof by registered or certified mail at his last known address.

On Termination of Contract All Rights Revert to Author

23. Upon termination of this agreement, all rights in and to the said literary work, including that of copyright, shall revert to the Author, without affecting the rights of the Publishers in the matter of other rights specified in Article 6. Upon termination of this agreement, furthermore, the complete ownership of all remaining bound copies of the said literary Work shall be vested in the Author, and the Author shall have thirty (30) days to notify the Publishers, by registered or certified mail, to ship the above-mentioned material to him, F.O.B., the Publishers' New York headquarters. In the event that the Author fails to request said copies, or to indicate his intention of so doing, within thirty (30) days after notice of termination of contract has been mailed to the Author, then the Publishers may dispose of said copies in any manner without having to report to the Author thereon, and the Publishers shall then be free from any further responsibility or accountability to the Author.

Author Also Has Right to Terminate

24. Should the Author wish to terminate this agreement, he shall have the right to do so following the same two-year period mentioned in Article 22 of this agreement and under the same terms and conditions as set forth in Article 23 with respect to termination by the Publishers.

No Sales Guarantee

25. This agreement is entered into by both parties hereto in good faith, it being distinctly understood that neither party has guaranteed, or intends to guarantee, the sale of any specific number of copies of the said Work, or receipts from possible subsidiary rights, it being mutually recognized and acknowledged that it is impossible to predict what success any book may attain.

Complete Contract

26. The Author acknowledges that the Publishers have not made any prior pledges, promises, guarantees, inducements, of whatever nature, either in writing or by word of mouth, or in any other form, except as may be contained in this agreement. This agreement constitutes the whole and complete understanding of the parties, and no representations other than those expressly contained herein shall be binding. No alteration, modification, amendment, or waiver of any provision hereof shall be valid and enforceable unless it be in writing and signed by both parties.

Production Schedule

27. The Publishers agree to complete production of the said Work within 150 to 240 working days from the date of the receipt by the Publishers of the signed agreement, with the initial payment indicated in Article 32 below, provided that they are not hindered by causes beyond their control or by delays caused by the Author.

Change of Address

28. The address of each of the parties shall be deemed to be that indicated in this agreement. All letters, communications and notices of whatever kind, nature and description sent to either party to the address so indicated shall be deemed good and sufficient, unless and until either party shall notify the other in writing, by registered or certified mail, of change of address.

Performance by Author and Publisher

29. The Publishers shall not be in default of any provisions of this agreement if the Author has not fully performed all the terms and conditions thereof by him to be performed, it being understood that performance by the Publishers is based upon full compliance by the Author; nor shall the Publishers be responsible if any delay in their performance is occasioned by governmental restrictions on essential materials, supplies or services, war, strikes, delays in shipping, shutdown of industry affecting the printing or publishing industry, distribution or sales, acts of God, or by any other conditions beyond the Publishers' control. If the Publishers shall nevertheless fail to perform any of the conditions by them to be performed, then and in that event it shall not be deemed a breach of this agreement unless the Author shall have given the Publishers written notice thereof by registered or certified mail, and the Publishers shall have failed to cure said default within a reasonable time thereafter.

Assignment of Contract

30. This agreement shall not be assigned by the Author without permission in writing from the Publishers, but, subject to the foregoing, the provisions of this agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators and assigns of the Author and of the successors and assigns of the Publishers.

Author's Guarantee

31. The Author covenants and represents that the said Work has not hitherto been published in book form, or, if so published, has become and is now the property of the Author; that the said Work contains no matters that, when published, will be libelous or otherwise unlawful, or which may infringe upon any proprietary interest at common law or statutory copyright; that the Author is the sole proprietor of the said Work and has full power to make this grant and agreement, and that the said Work is free of any lien, claim, charge or debt of any kind, and that he and his legal successors and/or representatives will hold harmless and keep indemnified the Publishers from any and all manner of claims, proceedings, losses, damages, costs, attorneys' fees and expenses which may be taken or incurred on the ground that the said Work is subject to any such lien, claim, charge or debt, or that it is such violation, or that it contains anything libelous or illegal.

Terms of Payment

32. In consideration of the services to be rendered by the Publishers in accordance with the terms hereof, and in further consideration of the expenditures to be incurred by the Publishers in causing the said Work to be printed on behalf of the Author, the Author agrees to pay to the Publishers the following sum of money, on the following terms:

Total sum to be paid.....$ 2675.00

$ 1000.00 to be paid with the signing of this agreement; and

$ 1000.00 to be paid upon receipt of the galley proofs; and

$ 675.00 to be paid thereafter in installments convenient to the author, with the understanding that the balance still due when said Work has been completed and ready for delivery shall be fully paid at that time.

☐ ***Check here if you wish to eliminate the installment plan and remit the entire sum when returning the signed contract. In appreciation for saving us bookkeeping costs, we shall send you, on publication, an additional fifty copies of the book, without extra charge.***

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the dates indicated alongside the signatures of both parties.

AUTHOR Leonard L. Truesdale .....(L.S.) Date Nov. 20, 1967

FOR THE PUBLISHERS Marian Littlefield .....(L.S.) Date 11/19/67
Vice-President

Please sign both copies of this agreement, retain one copy, and forward the other copy with your remittance to:

VANTAGE PRESS, INC., *Publishers*, 120 WEST 31 ST., NEW YORK, N. Y. 10001

AMENDMENTS

An eight-page black-and-white photographic section, with one or two photographs per page, is included at no additional cost.

Leonard J. Furbee
Author

May 20, 1967
Date

For the Publishers

Date

Vantage Press, Inc. • 120 West 31 Street • New York, N. Y. 10001

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,565

LEONARD J. FURBEE,

Appellant,

v.

VANTAGE PRESS, INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE'S BRIEF

Harry S. Weidberg
1401 K Street, N.W.
Washington, D.C. 20005
Attorney for Appellee.

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Cases:

*Cases chiefly relied upon are marked with an asterisk.

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APPELLEE'S BRIEF

STATEMENT OF THE ISSUES PRESENTED

Whether the order of the Trial Court granting appellee's motion to dismiss the complaint is supported by the record and applicable law? This case has never previously been before this Court.

STATEMENT OF THE CASE

In the Court below the appellee filed its motion to dismiss the complaint on the grounds that the trial court was without jurisdiction over the action and without venue jurisdiction over the defendant.

That paragraph 20 of the contract under which the suit was brought and upon which the complaint is buttressed, restricts the venue to "the legal tribunals of the State of New York," and constitutes such tribunals "the sole forum for resolving any questions or disputes or matters arising out of, or pertaining to this contract."

A photocopy of the said contract was attached to the motion to dismiss. (Appellant's Appendix 4)

After arguments on the motion to dismiss by the respective parties, the trial Court entered its order on June 17, 1970, dismissing the said complaint. (Appellant's Appendix 11).

Appellant thereupon appealed from the aforesaid order of the trial court.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

Plaintiff (appellant) and defendant (appellee) executed their contract on May 20, 1967, whereby they mutually agreed to the 32 paragraphs embodied in the said contract which is attached to and made a part of the motion to dismiss (Appellant's Appendix 5).

Paragraph 20 of the aforesaid contract provides as follows:

> "Regardless of the place of physical execution of this agreement, or its delivery, it shall be treated as though executed within the State of New York and shall be governed and interpreted according to the laws of that State; and the legal tribunals of the

> state of New York shall be the sole forum for resolving any questions or disputes or matters arising out of or pertaining to this contract."

The plaintiff's complaint is drawn in two counts. The first charges a breach of contract, while the second count charges that misrepresentations induced the plaintiff to enter into the contract with the defendant (Appellant's Appendix 1).

The appellant having consented by contract to submit any disputes arising out of the contract to the forum of the State of New York for determination, cannot now complain.

The judgment of the trial Court only reflected the enforcement of paragraph 20 of the said contract made by the parties themselves.

REFERENCE TO RULINGS BELOW

Page 11 of appellant's appendix.

ARGUMENT

THE PARTIES AGREED BY CONTRACT TO SUBMIT ANY QUESTIONS OR DISPUTES OR MATTERS ARISING OUT OF, OR PERTAINING TO THE CONTRACT, TO THE FORUM OF THE STATE OF NEW YORK

A. The Motion to Dismiss and Its Functions

Rule 12(b) of the Federal Rules of Civil Procedure provides, in part, as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter,
> (2) lack of jurisdiction over the person.

(3) improper venue,
(4) insufficiency of process,
(5) insufficiency of service of process, etc."

One of the principal reasons for the foregoing Rule was to provide for a quick presentation, both of the objections and of defenses, and to avoid delay incident to successive motions prolonging the final disposition of the case. *Sadler v. Pennsylvania Refining Co.*, 33 F. Supp. 414 (D.C.S.C., 1940).

The jurisdiction of a Federal Court is not presumed, and a complaint as a whole as against a motion to dismiss, must allege facts showing the jurisdiction of the court. *Brown Bros. Equipment Co. v. State of Michigan*, 266 F. Supp. 506 (D.C. Mich., 1967).

This court speaking of subject matter jurisdiction, in the case of *West Coast Exploration Co. v. McKay*, 93 U.S. App. D.C. 307, 213 Fed.2d 582 (1954), held: that "jurisdiction of the subject matter" means the nature of the cause of action and of the relief sought, and that it is conferred by sovereign authority which organizes courts, and is to be sought for in the general nature of its powers or in authority specifically conferred.

It was held in the case of *Kamsler v. Zaslawsky*, 7 Cir., 355 F.2d 526 (1966), that the district judge did not abuse his discretion in dismissing the complaint "sua sponte" for the lack of jurisdiction without hearing oral argument.

In the case at bar the motion to dismiss was most appropriate.

B. The Supreme Court Has Held that Parties, by Their Contracts, May Select the Forum in Which Contractual Disputes Shall be Determined

It is conceded by the provisions of paragraph 20 of the contract, aforesaid, that the parties, themselves, restricted all disputes arising out of the said contract to the forums of the State of New York.

The question, therefore, presented for the determination of this Court, is whether the parties to a contract may restrict any action arising out of the contract to a particular or pre-determined forum. This question was fully discussed and decided by the Supreme Court in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165.

In the latter case, Mr. Justice Frankfurter said, among other things, that: "The jurisdiction of the Federal Courts —their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation, relates to the convenience of litigants and as such is subject to their disposition."

The opinion of the Court further stated, in reference to the opinion of Chief Justice Waite in *Ex Parte Schollenberger*, (96 U.S. 369), that the parties were not geographically found in Pennsylvania, "and Chief Justice Waite so recognized. They were 'found' in the Eastern District of Pennsylvania only in a metaphorical sense because they had consented to be sued there by complying with provisions for designating an agent to accept service. Not less than three times does the opinion point out that the corporation gave 'consent' to be sued, and because of this consent the Chief Justice added that the corporation was found here. But the crux of the decision is its reliance upon two earlier cases, *B & O Railroad Co. v. Harris*, 12 Wall. 65 and *LaFayette Ins. Co. v. French*, 18 How. 404, recognizing that 'consent' may give 'venue.' The Phoenix and Clifton Insurance Company consented not to be 'found' but to be sued, since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the Federal Courts of the several states."

Mr. Justice Frankfurter concluded the foregoing opinion as follows:

> "In finding an actual consent by Bethlehem to be sued in the Courts of New York, Federal as well as State, we are not subjecting Federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case."

The question presented on the appeal in the case at bar, was again presented and decided by the Supreme Court in the case of *National Rental v. Szukhent*, 375 U.S. 311, 315-316.

There Mr. Justice Stewart stated, among other things, that:

> "The question presented here, on the other hand, is whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rules of Civil Procedure 4(d)(1), where the agent is not personally known to the party, and where the agent has not expressly undertaken to transmit notice to the party. The purpose underlying the contract provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. The contract specifically provided that 'this agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York.' And it is settled, as the courts below recognized, *that parties to a contract may agree in advance to submit to the jurisdiction of a given Court, to permit notice to be served by the opposing party, or even to waive notice altogether.*" (Emphasis supplied)

It is the contention of the appellee on this appeal that the parties' contract designating the forum for determining

contractual disputes, is valid and enforceable. The foregoing decisions of the Supreme Court support this contention.

C. The Decisions of this Court and Other Appellate Courts Support the Enforceability of Such "Predetermined Forum" Contracts

It is significant that in the case of *National Rental v. Szukhent, supra*, Mr. Justice Stewart cited with approval the decision of this Court in *Kenny Construction Co. v. Allen*, 101 U.S. App. D.C. 334, 248 F.2d 656 (1957), and the decision of the second circuit in *Bowles v. Schmitt & Co.*, 170 F.2d 617 (1948).

In the *Kenny* case, *supra*, where the issue involved the appointment of the clerk of the Municipal Court for the District of Columbia, as attorney for the purpose of receiving service of process in any legal proceedings arising out of work performed under contract, this Court held that: "We think the service on the clerk of the Municipal Court for the District of Columbia was good. The order quashing that service is vacated, and the case is remanded."

In the *Bowles v. J.J. Schmitt* case, *supra*, it was held by the second circuit, among other things, that: "In general, jurisdiction can be granted by consent and by a consent given prior to the bringing of an action. *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 . . . Indeed, it would seem that a defendant might make an agreement sufficiently detailed and exact that the very agreement itself should be taken as the process for the institution of suit."

"In the matter of arbitration, etc.," 232 F. Supp. 294 (D.C.N.Y., 1963), affirmed, 2 Cir., 336 F.2d 354, the Court in upholding the parties' agreement providing for arbitration and litigation in New York, stated that: "By entering into an agreement providing for arbitration in New York the parties consented to New York's jurisdiction. This service of process became significant only to the extent that it was required so as to avoid a violation of due process."

The foregoing decision was affirmed by the Second Circuit, *e nomine, Victory Transport, Inc. v. Comisaria General,* 336 F.2d 354. There the Second Circuit held that the Spanish General Counsel which had entered into a voyage charter of vessel to transport cargo of surplus wheat to Spain, by agreeing to arbitrate in New York, must be deemed to have consented to the jurisdiction of that Court in an action to compel arbitration, and the Federal District Court in New York had in personam jurisdiction to enter the order compelling arbitration.

In the case of *Erlanger Mills v. Cohoes Fibre Mills,* 4 Cir. 239 F.2d 502 (1956), held that: "Citizens of different states may, if they deem it desirable, agree that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of the state of one of the parties."

Holding to the same effect are the cases of *National Equipment Rental, Ltd. v. De-Wood,* 267 N.Y.S.2d 820 (1966), and *Emerson Radio, etc. v. Eskind,* 228 N.Y.S.2d 841, 843.

In the latter case Justice Stevens observed that: "consent jurisdiction is not violative of due process . . . . The defendant having recognized the validity of the agreement with a domestic corporation . . . shall not now be permitted to repudiate its consent provision because the contingency of litigation foreseen and provided, has become a reality."

In the federal courts an agreement limiting or restricting the venue of a potential action to a particular jurisdiction will be enforced, unless the limitation is unreasonable. This rule was first announced in the landmark case of *Wm. H. Muller & Co., Inc. v. Swedish American Line Ltd.,* 224 F. 2d 806 (2d Cir. 1955). In that case the court was faced with a contractual provision limiting the venue of any action to the courts of Sweden. The court observed that the traditional rule had been that such contractual provisions limiting venue were unenforceable. Quoting from Judge Learned Hand, the court on page 808 rejected that position as follows:

"However, we accept the conclusion of Judge L. Hand stated in his concurring opinion in the Krenger case, supra (174 F.2d 561), viz.:

> 'In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement (of contracts, § 558), they are invalid only when unreasonable; and Mitenthal v. Mascagni (183 Mass. 19, 66 N.E. 425, 60 L.R.A. 812), is a notable instance in which a contract in futuro was held "reasonable." What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.'
> "From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement can not oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented. Such, essentially, was our holding in Cerro De Pasco Copper Corp. v. Knut Knutsen in the case of The Geisha, 2d Cir., 187 F.2d 990. We adhere to that ruling."

The rule of reasonableness of the *Muller* case was quickly accepted in both federal and state courts. *See Central Contracting v. Maryland Casualty Co.*, 367 F.2d 341, 344 (3rd Cir. 1966); *Geiger Keilani*, 270 F. Supp. 761, 764 (E.D. Mich. 1966). Further, while the *Muller* case involved a maritime suit, the rule of reasonableness or federal rule has been applied to many different contractual disputes. *E.g.*, *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848, 851 (D. Hawaii 1968); *Geiger v. Keilani*, 270 F. Supp. 761, 764 (E.D. Mich. 1967). *Wilson v. Continental Casualty Co.*, 250 F. Supp. 622, 623 (D. Mont. 1966); *General Electric Co. v. City of Tacoma*, 250 F. Supp. 125 (W.D. Wash. 1966).

The rule of reasonableness was recently adopted by the Third Circuit. *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966). The *Central Contracting* case was a suit by public subcontractor against the general contractors' surety. The contract involved provided that any suit against the general contractors or their surety should be maintained in New York. The Third Circuit upheld the validity of this provision at page 344-45 as follows:

> "It is becoming more widely recognized that for reasons of business or convenience the parties may have bargained that all litigation arising out of their complex activity under a contract shall be drawn into one jurisdiction. So long as there is nothing unreasonable in such a provision there is no basis for viewing it as an affront to the judicial power, which must be stricken down. *On the contrary, it should be respected as the responsible expression of the intention of the parties so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.*" (Emphasis added)

It has generally been determined that the parties in this type of proceedings may select arbitration or any other forum which is reasonable under the circumstances, according to the *Restatement of Contracts*, Section 358.

A further example of "reasonable relationship," and confirmation of the intent of the parties is found in D.C. Code 28 1-105 (1967 Ed.) of the *Uniform Commercial Code.* This states that where:

> ". . . a transaction bears a reasonable relation to this District and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."

In *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir.) the *Muller* was overruled with regard to maritime suits within the scope of the United States Carriage of Goods by Sea Act. However, this overruling has absolutely no effect on

the validity of the federal rule as applied to contractual provisions not involving the Carriage of Goods by Sea Act. The soundness of the federal rule was recently re-emphasized in *Geiger v. Keilani,* 270 F. Supp. 761 (E.D. Mich. 1966) in footnote 3 on page 764 as follows:

> "Ironically, Muller is no longer authority in many maritime suits. The decision has been overruled insofar as it had held that a stipulated forum agreement could be reconciled with the Carriage of Goods by Sea Act. Indussa Corp. v. S.S. Ranborg, 377 F. 2d 200 (2d Cir. 1967). However, its rationale is still good and highly persuasive in the present case. Indeed, the court in Indussa sought to explain the result in Muller on the ground that it had gotten carried away with the 'general principles of contract law' appropriate in contests where COGSA is irrelevant."

In summary, the federal courts will enforce contractual provisions limiting jurisdiction to a particular forum if the restriction is reasonable. Some of the factors considered in determining reasonableness are:

(1) The residency of the parties;

(2) The plan of execution and/or the performance of the contract; and

(3) And the location of the parties and witnesses. *See Central Contracting Co. v. Maryland Casualty Co.,* 367 F. 2d 341 (3rd Cir. 1966); *Geiger v. Keilani,* 270 F. Supp. 761 (E.D. Mich. 1966).

With regard to the present case it is clear that paragraph 20 is not unreasonable. Indeed, it is eminently fair. The agreement was executed on behalf of defendant in New York and was performed in New York. Defendant is a New York corporation having its principal place of business in New York, and is therefore a corporate resident of the State of New York. All of the witnesses that defendant presently plans to call upon trial of this matter reside in the State of New York. In short, the forum selected by the parties

under the agreement is the residency of defendant, the place of execution of the agreement on behalf of the defendant, the place of performance of the agreement, and the residency of all of defendant's witnesses.

In *Schwartz v. Zim Israel Navigation Co.*, 15 Misc.2d 576; 181 N.Y. Supp. 2d 283 a citizen of Israel sued an Israeli ocean liner corporation for personal injuries. It should be noted that while this case involves an ocean liner corporation, this was not a maritime suit, but rather a simple personal injury action. The Israeli corporation had provided in its contract with plaintiff, that any suit he might bring would have to be brought within the courts of Israel. In upholding such a provision the court stated at page 287:

> "It is true that, by such an agreement, the parties can not oust our courts of jurisdiction otherwise obtaining; but if, in the circumstances of the particular case, the court finds that such an agreement is not unreasonable, it may give it effect by declining jurisdiction and relegating a litigant to the forum to which he has assented. It was so held in the case of *William H. Muller & Co., Inc. v. Swedish American Lines Ltd.*, 2d Cir., 224 F.2d 806, which involved a provision in a bill of lading requiring that any dispute arising under it be litigated in a foreign country."

The federal rule was also applied in *Export Ins. Co. v. Mitsuiss Co.*, 26 App. Div. 2d 436, 274 N.Y. Supp. 2d 977 in which the court stated at page 980:

> "Although we may not be required to give effect to a contractual provision which ousts our courts from jurisdiction . . . we are not precluded from enforcing it where it would be right and proper so to do."

The attention of the Court is also drawn to the fact that this very clause 20 (of the contract at issue) has already been construed in the Federal and State Courts of California in Defendant's favor.

In *Bram Vanderstok v. Vantage Press, Inc., et al.*, No. 69-816-JWC (1969), in the United States District Court, Central District of California, an unreported case, plaintiff raised the same point regarding this paragraph 20, and the place of trial. On a number of occasions, after thorough consideration, the Court said: "I am of the opinion that the contract provisions are reasonable, and should be enforced."

On another point, however, that of jurisdictional amount for the Federal Court, it was remanded to the State Superior Court.

Thereafter, the case became *Bram Vanderstok v. Vantage Press, Inc., et al*, No. 950043, Los Angeles Superior Court. Again the plaintiff argued strenously regarding this article 20. The Court held that this choice of forum was "reasonable," and purely on the basis of the same article 20, the Court dismissed plaintiff's complaint as being instituted in the wrong forum.

D. Appellant's Brief Fails to Cite and Discuss Any Cases in Point

The casuistry of the position taken by the appellant in his brief herein, is that he has confined his argument to the jurisdictional requirements of Courts, the legislative grant of authority to courts, and the procedural rules of courts. This argument presents no barrier to the enforcement of the parties' contract "per se."

As stated by Mr. Justice Frankfurter in *Neirbo v. Bethlehem Shipbuilding Corporation, supra*, that: "In finding an actual consent by Bethlehem to be sued in the Courts of New York, Federal as well as state, we are not subjecting Federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a state of facts which will authorize the Courts of the United States to take cognizance of a case."

Thus appellant offers in support of his position the case of *Woodmen of the World v. F.C.C.*, 69 App. D.C. 87, 99 F.2d 122, but the issue involved in that case was whether this court had jurisdiction over a case, when a petition for rehearing was pending in the trial court. In opposition to a dismissal by this Court, it was urged that all of the parties had treated the petition for rehearing, which was still pending in the lower court, as abandoned, and did not consider it to be still pending in the trial court. The foregoing issue presented only the question of intra-court consent or acquiescence of the parties relative to the procedural rules of the court. It does not reach the issue of the enforceability of parties' contract, designating before-hand the forum for determination of contractural disputes.

Indeed, it is the position of the appellee that the "parties' contract" points out and restricts the forum to a particular state, and thereafter it is incumbent upon the parties to comply with the jurisdictional and procedural requirements of such forum. In the latter sense the "parties' contract" in question does not purport to undermine the jurisdictional or procedural powers of the Courts.

Appellant analyzes the case of *United States v. Ickes*, 66 App. D.C. 3, 84 F.2d 257, wherein in answer to the contention that the parties had submitted themselves to the Court's jurisdiction by the entry of a consent order, and where the issue of subject-matter jurisdiction was presented by the record, this Court held that since the lower Court did not have jurisdiction, the consent order was a nullity, "nor can this lack of jurisdiction be waived . . . nor will consent or silence supply it."

The foregoing decision of this Court involved an "intra-court" issue, namely, subject-matter jurisdiction of the trial court. The issue there is inapposite to the issue involving the enforcement of the parties' contract pre-determining the forum for settlement of disputes.

It was never the position of the appellee that such parties' contract possessed the force of creating or conferring subject matter jurisdiction on the courts.

Similar issues are presented by the case of *United States v. I.C.C.*, 56 App. D.C. 40, 8 F.2d 901, cited and analyzed by appellant. Again this court held that "Jurisdiction cannot be conferred upon the Court either by admissions, stipulations, or otherwise." The jurisdiction to which this Court referred is subject-matter jurisdiction and not venue jurisdiction.

The Supreme Court has long since recognized that "consent" may give "venue." Such was the holding of Chief Justice Waite in *Ex Parte Schollenberger*, 96 U.S. 369, and reaffirmed by Mr. Justice Frankfurter in *Neirbo Co. v.. Bethlehem Shipbuilding Corporation*, 308 U.S. 165.

If the appellant had filed suit in one of the courts of the State of New York there would have been no venue jurisdictional objection raised against such suit by the appellee.

The appellant having recognized the validity of the agreement with the appellee by operating under or within its terms, cannot now be permitted to repudiate its consent provision because the contingency of litigation forseen and provided for in the forum of New York has become a reality.

CONCLUSION

In the light of the decisions of the Supreme Court and this Court, coupled with the decisions of other Courts, discussed hereinabove, the appellee urges this Court to affirm the judgment entered below, for the reason that the parties herein have consented by contract to adjust their disputes in the legal tribunals in the State of New York, and in consequence thereof no other courts have jurisdiction of the cause of action herein.

Respectfully submitted,

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